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Draft Model Law on International Commercial Conciliation

Compilation of comments by Governments and international organizations

Addendum

Contents

	Pages
Introduction	2
Compilation of comments	3
A. States	3
Philippines	3

* The date of submission of the document results from the dates at which comments were received by the Secretariat.

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Introduction

1. In preparation for the thirty-fifth session of the Commission, the text of the UNCITRAL draft model law on international commercial conciliation was circulated to all governments and to interested international organizations for comment. The text of the draft model law was approved by UNCITRAL Working Group II (Arbitration and Conciliation) at its thirty-fifth session and annexed to the report of that session (A/CN.9/506). Additional comments received as of 30 April 2002 from one government are reproduced below in the form in which they were communicated to the Secretariat.

Compilation of comments

A. States

Philippines

[Original: English]

A. Article 1. Scope of Application and Definitions

"(1) This law applies to international commercial conciliation."

The definition of the term "commercial" should be included in the body of the draft UNCITRAL Law on International Commercial Conciliation (hereafter referred to as the "Draft Law"). The inclusion of such definition is necessary to determine the scope and application of the proposed Draft Law and at the same time determine whether the transaction is definitely commercial or not.

"(2) For the purpose of this Law, "conciliation" means a process, whether referred to by the expression conciliation, mediation or an expression of a similar import, whereby parties request a third person, or a panel of persons, to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator or panel of conciliators does not have the authority to impose upon the parties a solution to the dispute."

Although it is agreeable that the conciliator or the panel of conciliators is not given the authority to impose upon the parties a solution to the dispute, it is however desirable that the conciliator or panel of conciliators be given at least the expressed authority to make non-binding proposals for possible solution in the settlement of the dispute, subject to the agreement of the parties. This will expedite the settlement of dispute.

"(3) A conciliation is international if:

(a) The parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) The state in which the parties have their places of business is different from either;

(i) The State in which a substantial part of the obligations of the commercial relationship is to be performed; or
(ii) The State with which the subject matter of the dispute is most closely connected."

The term "substantial part of the obligations" and "most closely connected" should be elaborated and explained further. It may happen that in a single contract, a series of transactions are required to be performed, each act

constituting an integral part of the contract or substantial part of the performance of the obligation.

"(8) This Law does not apply to

(a) Cases where a judge or an arbitrator, in the course of a court or arbitral proceeding, attempts to facilitate a settlement; and
(b) [...]"

It is suggested that clarification should be made whether the provision applies to cases where the conciliation proceeding has already been commenced and thereafter a party to the dispute filed a case in court to preserve his or her right. It is uncertain furthermore whether the court can totally disregard the findings in the conciliation proceedings and make a determination on its own with regard to the facts necessary for the settlement of the dispute.

B. Article 6. Appointment of Conciliators

"(6) When a person is approached in connection with his or her possible appointment as a conciliator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. A conciliator, from the time of his or her appointment and throughout the conciliation proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him or her."

The last sentence of the above provision could lead to abuse and should be amended to make it still necessary for the conciliator appointed to personally inform the parties on the circumstances that might affect his or her impartiality or independence as a conciliator to the dispute, when such facts or circumstances are already known to the parties.

In addition, Article 6 should provide provisions qualification, regarding the qualification replacement and incapacity of the conciliator.

C. Article 8. Communication Between Conciliator and Parties

"Unless otherwise agreed by parties, the conciliator, the panel of conciliators or a member of the panel may meet or communicate with the parties together or with each of them separately."

It must be noted that under the UNCITRAL Conciliation rules, Article 9 (2) states that:

"Unless the parties agreed upon the place where the meeting with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings."

D. Article 11. Admissibility of Evidence in Other Proceedings

"(1) Unless otherwise agreed by the parties, a party that participated in the conciliation proceedings or a third person, including a conciliator, shall not in arbitral, judicial, or similar proceedings rely on, introduce as evidence or give testimony or evidence regarding, any of the following:

(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings;
(b) Views expressed or suggestions made by a party to the conciliation in respect of a possible settlement of the dispute;
(c) Statements or admissions made by a party in the course of the conciliation proceedings;
(d) Proposals made by the conciliator;
(e) The fact that party to the conciliator had indicated its willingness to accept a proposal for the settlement made by the conciliator;
(f) A document prepared solely for purposes of the conciliation proceedings."

It is suggested that the Draft Law should state that the executed and signed Conciliation agreement be presented as part of proof regarding the conciliation proceedings itself. The conciliation agreement, it must be noted, constitute a binding contract between the parties to the settled dispute.

E. Article 15. Enforceability of Settlement Agreement

"If the parties reach and sign an agreement settling a dispute, that settlement agreement is binding and enforceable... [the enacting State inserts a description of the method of enforcing settlement agreements or refers to provisions governing such enforcement]."

It is suggested that the term "final" be inserted before the word "binding" to give emphasis to the effect of the settlement agreement. The insertion of the word "final" in the provision will serve as a caveat that the settlement agreement cannot be disregarded or changed arbitrarily.